

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In Re: Pork Antitrust
Litigation

File No. 18-cv-1776
(JRT/HB)

Saint Paul, Minnesota
November 21, 2018
9:30 a.m.

BEFORE THE HONORABLE HILDY BOWBEER
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE
(MOTIONS HEARING and STATUS CONFERENCE)

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8 Proceedings recorded by mechanical stenography;
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P R O C E E D I N G S

IN OPEN COURT

THE COURT: Thank you for being patient this morning. I'll undertake to get these conferences going more on time as we proceed in the future. We've got quite a gathering today and I understand we've got quite a few on the phone as well. What I'm going to do is I think we've got a handheld mic available; is that right? Yes, we do. We're going to take appearances first. So first let me call the case.

This is In Re: Pork Antitrust Litigation. The proceedings are being docketed under the case number 18-cv-1776. We're here for a status conference but also for a hearing on Defendants' Motion to Stay Discovery which is at Docket Number 193. So let me get appearances first for the Plaintiffs.

MR. GUSTAFSON: Good morning, Your Honor. Dan Gustafson from Gustafson Gluek on behalf of Plaintiffs.

MS. RESCH: Good morning, Your Honor. Brittany Resch from Gustafson and Gluek on behalf of the Consumer Indirect Plaintiffs.

THE COURT: And I ask everybody to speak slowly. We've got a court reporter who doesn't recognize everybody yet and is new to the case, and may not be the same court

1 reporter who is here in the future, so keep it slow and keep
2 your voice up.

3 MS. WEINER: Good morning, Your Honor. Melissa
4 Weiner, Pearson, Simon & Warshaw here in Minneapolis, for
5 the Plaintiffs as well.

6 MR. CLARK: Brian Clark, Lockridge Grindal Nauen,
7 on behalf of the Direct Purchaser Plaintiff class.

8 MS. SCARLETT: Shana Scarlett from Hagens Berman
9 on behalf of the Consumer Indirect Purchaser Plaintiffs.

10 THE COURT: And is anyone in the audience here and
11 making an appearance on behalf of the Plaintiffs? Okay.

12 MS. ODETTE: Elizabeth Odette on Behalf of Direct
13 Purchaser Plaintiffs.

14 MS. WAGNER: Arielle Wagner at Lockridge Grindal
15 Nauen on behalf of Direct Purchaser Plaintiffs.

16 MS. CHEN: Stephanie Chen at Lockridge Grindal
17 Nauen on behalf of Direct Purchaser Plaintiffs.

18 THE COURT: Is there anyone on the phone who
19 intends to make an appearance, and by that I mean who
20 intends to actually speak to any of the issues today on
21 behalf of any of the Plaintiffs' groups?

22 Apparently not.

23 All right. Let's go on with the Defendants.

24 MR. SUMMERLIN: Gene Summerlin with Husch
25 Blackwell on behalf of Triumph Foods.

1 MR. HEEMAN: Good morning, Your Honor. Donald
2 Heeman, Felhaber Larson, on behalf of the JBS Defendants.

3 MR. PARKER: Richard Parker on behalf of
4 Smithfield.

5 MR. RASHID: Good morning, Your Honor. Sami
6 Rashid from Quinn Emanuel on behalf of the JBS Defendants.

7 MR. JOHNSON: Good morning, Your Honor. Mark
8 Johnson, Greene Espel, for the Clemens Defendants.

9 MS. BRIESACHER: Good morning, Your Honor.
10 Christina Briesacher on behalf of the Clemens Defendants.

11 THE COURT: And to the audience.

12 MR. ROBISON: Good morning, Your Honor. Brian
13 Robison with Gibson Dunn for the Smithfield Defendant.

14 MR. WOODRUFF: Good morning, Your Honor. Jon
15 Woodruff on behalf of the Seaboard Defendants.

16 MR. GREENE: Good morning, Your Honor. William
17 Greene, Stinson Leonard Street, for Defendant Seaboard
18 Corporation and Seaboard Foods.

19 MR. COLEMAN: Good morning. Craig Coleman from
20 Faegre Baker Daniels on behalf of the Hormel Defendants.

21 MR. HALL: Good morning. Isaac Hall from Faegre
22 Baker Daniels on behalf of the Hormel Defendants.

23 MR. COTTER: Good morning, Your Honor. John
24 Cotter from Larkin Hoffman on behalf of Smithfield.

25 MR. GRAHAM: David Graham from Dykema Gossett on

1 behalf of the Tyson Defendants.

2 MS. NELSON: Good morning, Your Honor. Jessica
3 Nelson from Felhaber Larson on behalf of the JBS Defendants.

4 MS. STILSON: Good morning, Your Honor. Jaime
5 Stilson on behalf of the Indiana Packers and Mitsubishi
6 Defendants.

7 THE COURT: And let me ask whether there's anyone
8 on the phone who anticipates or who may want to reserve the
9 opportunity for a speaking role today?

10 MS. MILLER: Good morning, Your Honor. This is
11 Britt Miller of Mayer Brown on behalf of the Indiana Packers
12 Corporation and Mitsubishi Corporation America.

13 MR. NEUWIRTH: Good morning, Your Honor. This is
14 Stephen Neuwirth from Quinn Emanuel for the JBS Defendants.

15 MR. BERNICK: Good morning. This is Justin
16 Bernick from Hogan Lovells on behalf of Agri Stats.

17 MR. MONTS: And William Monts, Your Honor, on
18 behalf of Agri Stats, also from Hogan Lovells.

19 MS. ROHRBAUGH: Good morning, Your Honor. This is
20 Tiffany Rider Rohrbaugh and Rachel Adcox from Axinn Veltrop
21 & Harkrider, on behalf of the Tyson Defendants.

22 THE COURT: Anyone else who wants to make an
23 appearance today?

24 All right. I'll just remind the folks on the
25 phone to keep your phones on mute when you aren't going to

1 be speaking and that will make sure we don't get any kind of
2 interference with our ability to hear what's going on here
3 in the courtroom.

4 We've got a couple of things on the docket this
5 morning. One is the Defendants' Motion to Stay Discovery.
6 The other is a status conference that we had scheduled in
7 any event.

8 I've reviewed the papers submitted by the parties
9 as to both of those tasks, and my inclination is to start
10 with the Motion to Stay and then segue to the status
11 conference unless anybody suggests that that isn't quite the
12 logical way to proceed. All right. That looks like
13 everybody is in agreement. So who is going to be arguing
14 Defendants' Motion to Stay?

15 MS. BRIESACHER: I am, Your Honor, Christina
16 Briesacher.

17 THE COURT: All right. Please come forward.

18 MS. BRIESACHER: May I begin?

19 THE COURT: Yes.

20 MS. BRIESACHER: The Supreme Court in *Twombly* has
21 cautioned that antitrust discovery is particularly
22 burdensome. Costs can increase quickly and become extremely
23 high. Even a cursory review of the requests for production
24 that Plaintiffs have served proves that this case will be no
25 exception. Indeed, you know, this case involves three

1 putative classes, sixteen Defendants from nine corporate
2 families. And the allegations span nearly twelve years. As
3 a result, courts, including the Eighth Circuit and the
4 District Court here, have heeded the Supreme Court's words
5 of caution and declined to open the floodgates of discovery
6 prior to Plaintiff satisfying their initial pleading
7 burdens.

8 These and other cases recognize that a limited
9 stay in discovery is important to resolve gating issues
10 raised at the outset of litigation that will not only
11 prevent burdensome and potentially unnecessary discovery and
12 expenses, it will also serve judicial economy.

13 Now, the Defendants here are not seeking a full
14 stay of discovery. In fact, there are certain items that we
15 have agreed to proceed with pending the Motions to Dismiss,
16 and these include the initial -- serving initial
17 disclosures, serving readily accessible org charts, which we
18 will do in I think less than two weeks now, and negotiating
19 the ESI protocol and protective order that we have done and
20 submitted a few discrete issues to the Court. These actions
21 will help facilitate discovery if it becomes necessary
22 without opening kind of the floodgates of discovery, running
23 afoul of what *Twombly* cautioned against.

24 Plaintiffs' requests, on the other hand, although
25 styled as threshold tasks, will cause Defendants significant

1 undue burden and will create inefficiencies not only for the
2 parties but also for the Court. Each of the factors that
3 courts have considered in determining whether to stay
4 discovery, including a quick peek at the merits, burden to
5 Defendants, potential prejudice to Plaintiffs and judicial
6 economy, all weigh in favor of a stay here.

7 Now, I'd like to turn now to the six items that
8 are in dispute today and discuss those in more detail.

9 THE COURT: And in particular as you go through
10 those, I'd like to understand better, because I don't
11 have -- I don't have a lot in your brief about specifically
12 what the burden is. I mean, I understand as a general
13 matter that if Judge Tunheim were to grant the motions in
14 their entirety then none of this would be necessary.

15 MS. BRIESACHER: Right.

16 THE COURT: But we are crossing that particular
17 bridge and saying yes, it makes sense to do certain
18 foundational things. The question is how much of that. So
19 I would like to understand better your argument about burden
20 with respect to some of these because if the cases or some
21 part of them do survive the Motions to Dismiss, I think it's
22 in everyone's interest to be poised and ready to get off the
23 mark, so...

24 MS. BRIESACHER: Right, yes. So the first item,
25 which is number one on Plaintiffs' list, is something that

1 they call ESI disclosures. And really what these ESI
2 disclosures are are broad interrogatories and requests for
3 production seeking kind of discovery about discovery type
4 information spanning nearly 12 years. So they include kind
5 of lists of individuals that worked in a variety of
6 positions, including in some instances their assistants and
7 secretaries over the past 11 years; office fax and cell
8 phone numbers for all these individuals that are identified;
9 non-custodial data sources and inaccessible data sources
10 that are likely to contain, quote, discoverable material all
11 over the last 11 years, and other types of requests for
12 documents.

13 Now, we assert that these ESI disclosures should
14 be stayed because they will be unduly burdensome for the
15 Defendants. They would involve the digging through
16 information and historical systems that are a decade old to
17 locate the requested information. To determine what may be
18 accessible versus inaccessible requires work by our clients,
19 by the attorneys, by vendors, all of which is expensive and
20 may ultimately be unnecessary.

21 The outcomes of the Motions to Dismiss further
22 could have a significant impact on the information that
23 needs to be identified here even if they are not granted in
24 their entirety. For example, individual defendants may be
25 dismissed and the relevant time period may be significantly

1 reduced, which would obviate the need to disclose much of
2 what the Plaintiffs requested. You know, trying to identify
3 systems over the past nearly 12 years and figure out what's
4 accessible and inaccessible is a vastly different exercise
5 than doing it over the last few years.

6 Finally, they have a last item in their ESI
7 disclosures that they call prior government investigation
8 document productions, and that is something that they have
9 asked for that appears in three of the six disputed items on
10 the list and I will address that shortly.

11 Plaintiffs kind of also are requesting
12 negotiations of Rule 34 requests for production and
13 negotiating documents and custodians, and this is number
14 five and number six on their list. For each of these tasks,
15 in order to even begin negotiating responses to requests for
16 production you need to go kind of far down the road to
17 understanding what data exists, how it's stored, what's
18 available, what can be reasonably collected, and all within
19 taking into account the bounds of proportionality.

20 The Sedona Principles further recognized that
21 determining what is relevant and proportional under the
22 circumstances is a highly fact-specific question. Even this
23 process to determine appropriate responses to discovery
24 requests will take a significant amount of time and our
25 client's time, especially for the types of requests that are

1 as broad as those that Plaintiffs have served. And all of
2 this time and resources are even before you get to the stage
3 of meeting with the Plaintiffs, kind of meeting and
4 conferring, negotiating and taking disputes to the Court.

5 Kind of second, you know, all of this is a little
6 bit like putting the cart before the horse. Forcing the
7 Defendants to respond now will create significant
8 inefficiencies for the parties and the Court. So what the
9 Defendants will be left to do is caveat all of their
10 responses, trying to determine what might be relevant
11 following the Motions to Dismiss.

12 So the responses, for example, will say, We'll
13 produce X, you know, assuming this is relevant when the
14 Motions to Dismiss really come out; assuming that it's not
15 going to be too burdensome to collect once we actually go
16 and try and pull the requested information; assuming this is
17 all within the bounds of proportionality once we see what
18 the Court does on the rulings for the Motions to Dismiss.

19 And so what's going to end up happening is that
20 once we do get a ruling, even if the Motions to Dismiss are
21 denied, and in particular if some part of them are granted,
22 is the Defendants are going to have to go through and redo
23 all of their responses to say what they actually will
24 produce in light of the ruling.

25 Discovery, and especially discovery in antitrust

1 matters, is expensive enough without having to do things
2 twice. In addition, identifying document custodians and
3 data system is further keyed off discovery requests and
4 responses, which in turn is keyed off what claims are
5 remaining, what defendants are remaining, and what the
6 relevant time period of the remaining case will be.

7 For example, you know, like I've stated,
8 negotiating custodians and databases that will be produced
9 in this case is going to be vastly different depending on
10 whether the case spans 12 years or it spans kind of less
11 than that, 4 years or fewer. And in order to negotiate what
12 systems might be in play in this case, the devil is really
13 in the details. It is a significant undertaking to
14 understand how data could be collected, what might be
15 exported, what's available, and what's been within the
16 bounds of proportionality. Having to undertake ESI
17 disclosures, RFP responses, and identifying custodians and
18 systems now is really the exact type of burdensome discovery
19 that *Twombly* and other cases warn against.

20 The next two items on the Plaintiffs' list, kind
21 of one, which is number three on their list, is the Rule
22 26(f) report and the Rule 16 conference. Now, this item
23 should be stayed because it's really just inefficient to set
24 out a schedule for the case before you know the scope of the
25 case. Even if the case is dismissed in part, kind of the

1 relevant time period and the remaining Defendants will have
2 a significant impact on portions of the 26(f) report. Kind
3 of even as just one example, the number of depositions in
4 the case could vary considerably depending on the number of
5 Defendants that remain in the case and the relevant time
6 period in the case.

7 Absent a stay here, we risk trying to negotiate in
8 a vacuum. We risk taking disputes to the Court in a vacuum
9 without knowing kind of the most critical fact, which is the
10 scope of case. These disputes further, you know,
11 essentially become unresolvable until we know kind of what
12 the path of the case will take following the Motions to
13 Dismiss rulings. We also, again, we risk inefficiencies for
14 the parties and for the Court having to renegotiate key
15 parts of the Rule 26(f) report following the rulings on the
16 Motion to Dismiss.

17 Now, what the Defendants have done here is we have
18 already agreed to do the portions of the Rule 26(f) report
19 that kind of make sense at this stage. So we're doing the
20 initial disclosures, which I think is I believe (c)(1) of
21 the template that is used in this district. We're already
22 doing the protective order, the ESI protocol, we've talked
23 about privilege which is encompassed in the protective
24 order. So those are the things that make sense to do that
25 are not going to be things we have to redo once we get a

1 Motion to Dismiss ruling, but really the rest of it is going
2 to be inefficient for the parties and the Court to set out
3 before the Motion to Dismiss ruling.

4 THE COURT: Let me ask, one of the things -- and I
5 think it's primarily related to category one or task one of
6 the tasks that Plaintiffs have proposed ought to go forward.
7 And if I am reading the papers correctly, it looks like
8 they've proposed to you an order that's modeled to some
9 extent, to a fair extent on the order that the magistrate
10 judge entered in the *Broiler Chicken* case. And I'm looking
11 particularly at Exhibit E to I think it is Mr. Clark's
12 affidavit, and the Docket Number is 205-2, and it goes
13 through and lists a number of things that I believe the
14 magistrate judge in the *Broiler Chicken* case had --
15 Magistrate Judge Gilbert, I believe, had also found
16 appropriate as -- and I'm not saying I'm mapping to that but
17 I'm interested in this particular proposed order and
18 understanding better why some or all of what's contemplated
19 here shouldn't happen sooner rather than later.

20 For example, item A on page 2 is org charts, and I
21 don't know whether your agreement to provide readily
22 available org charts essentially covers A or whether what
23 you're agreeing to do is somewhat more restricted than that.
24 So could you walk -- taking this as a template, could you
25 walk through for me and tell me what your -- what your

1 agreement encompasses and where it -- and where you're
2 departing from this, tell me a little more about why it
3 would be unduly burdensome to do it now rather than later.

4 MS. BRIESACHER: Yes. Your Honor, I think kind of
5 walking through the ESI disclosure, so the first part on org
6 charts, I mean what they call org charts, I mean is really
7 they've got specific titles and specific roles that they are
8 seeking information about over the last kind of 11 years.
9 Not only on a variety of different positions but also
10 information on phone numbers, cell phone, fax and business
11 phone that have been used over the last years.

12 What Defendants have agreed to provide is kind of
13 the relevant org charts that are readily accessible. These
14 are going to require kind of a significant amount more
15 detail than what Defendants are going to produce here. And
16 trying to kind of dig out who might have been in a variety
17 of the different positions over the last kind of 12 years is
18 really an exercise that is going to become burdensome for
19 the Defendants, particularly if, you know, some of this
20 might not be required, particularly if the relevant time
21 period shrinks. You know, trying to go dig out who might
22 have been in a variety of different roles over the last 12
23 years is a different task than, for example, who might have
24 been in a variety of the roles for 4 years.

25 So I think the difference is we're kind of pulling

1 what's readily accessible, which it's going to be
2 defendant-by-defendant specific, but should cover, I would
3 say, a good portion of what Defendants [sic] are seeking.
4 But they are requiring kind of an additional level of
5 specificity here that will escalate costs and become
6 burdensome for the Defendants.

7 On the kind of phone directories which I've hit
8 on, you know, I think it depends on the Defendants whether
9 their org charts include some sort of phone directory. But
10 if they don't, you know, trying to go through and figure out
11 what those phone numbers are at this stage when it might not
12 be required down the road is going to be kind of, again,
13 something that is burdensome for the Defendants,
14 particularly, you know, with cell phone numbers, fax numbers
15 and office numbers that might have changed over the years.

16 For e-mail systems, you know, the identification
17 of e-mail systems and version numbers is, again, you know, I
18 think a lot of our clients probably have changed e-mail
19 systems over the years and trying to figure out what the
20 e-mail system is historically going back 12 years is another
21 task that we think is going to create some undue burden at
22 this stage of the case, and really I don't think it's going
23 to get us -- it's not going to get us very far.

24 And then really I think the non-custodial data
25 sources, which is D, I believe, and then inaccessible data

1 sources, I think are really where a lot of the burden is
2 going to come into play. You know, although Defendants are
3 fully complying with all of our preservation obligations,
4 what Plaintiffs propose here is really kind of a different
5 animal. Trying to figure out what exact data is on these
6 systems.

7 For the legacy systems, you know, it's a
8 relatively simple task to ensure that legacy systems and
9 back-up tapes are preserved, but it's different to try and
10 go in and figure out what data exists on those systems,
11 whether we think it's going to be discoverable, and then
12 determining whether we're going to be able to get any
13 information out of there so we know if it's going to be an
14 inaccessible system data source or something that we think
15 is going to be discoverable.

16 And, frankly, what is discoverable in this case is
17 going to turn on what happens to the Motions to Dismiss. So
18 this is really an exercise that is kind of too soon to do
19 before we know the full scope of the case. And then, again,
20 with kind of turning to the policies again, kind of pulling
21 the policies over the last 11 years may not be necessary if
22 this case is significantly reduced in time, and phone
23 records as well.

24 The last category is the prior government
25 investigation documents. And this is something that wasn't

1 in the *Broiler's* order but appears in the order that
2 Plaintiffs are seeking here. And here, as I mentioned, this
3 request really appears at three of the six disputed
4 categories. It's included in the ESI disclosures. It's a
5 standalone kind of request, it's number four on their list,
6 but they have also served requests for production asking for
7 these same documents. And here --

8 THE COURT: But they are not maintaining that the
9 requests for production in and of themselves ought to be
10 responded to. Their requests with respect to the requests
11 for production is to negotiate the scope of production.

12 MS. BRIESACHER: Correct.

13 THE COURT: And I realize you've got a separate
14 objection about that. But my understanding is nobody is
15 here arguing that a part of -- that they are looking for a
16 decision from me that you will move forward with actually
17 producing, searching for and producing documents in
18 response.

19 MS. BRIESACHER: That's correct, yes. I think
20 we're in agreement that that won't happen, but even kind of
21 this first step of beginning to negotiate, you're still
22 going to have to go kind of all the way down the path as if
23 you're responding. You can't negotiate if you don't know
24 what data might exist, what data might be responsive, what
25 we think is going to be proportional to the needs of the

1 case, what we think is going to be relevant. So even
2 negotiating requires Defendants to basically get all the way
3 there as if we were responding.

4 Okay. So turning back to the requests for DOJ
5 documents, it's kind of inappropriate to just require a
6 wholesale production of those documents now. First, as we
7 mentioned in our brief, the pork processor defendants have
8 no documents that are responsive to this request relating to
9 pork products. For Agri Stats, you know, this is a long
10 dead investigation. It was closed without action six years
11 ago. The documents are preserved. There's, you know,
12 Plaintiffs have shown no reason why they need these
13 documents now.

14 And kind of finally, and most significant, there
15 are going to be relevance issues with this set of documents
16 that were not present in *Broilers*. Kind of a quick preview
17 is the document productions here have primarily focused on
18 the chicken industry so there are going to be relevance
19 considerations to whether, you know, some or all or a
20 portion of these documents are going to be relevant in this
21 case. Kind of given the relevance concerns, it makes more
22 sense to have these go through normal course discovery
23 requests, you know, an opportunity to respond and object, to
24 bring any disputes to the Court about relevance rather than
25 just require kind of a wholesale production now where these

1 relevance concerns don't have an opportunity to be
2 addressed.

3 THE COURT: Do we have a sense of the volume of
4 that production?

5 MS. BRIESACHER: You know, I don't have a sense of
6 how voluminous it is, but I do know Agri Stats' counsel is
7 on the phone and they are kind of available, I'm sure, to
8 answer that question if you would like.

9 THE COURT: Counsel for Agri Stats, and I will ask
10 you to identify yourself again on the phone, but are you
11 able to -- do you know approximately the size of the
12 production that was made to DOJ?

13 MR. BERNICK: Your Honor, this is Justin Bernick
14 from Hogan Lovells on behalf of Agri Stats. I don't have
15 the precise number of documents in front of me. I can tell
16 you that it was a custodial-based production that spanned
17 multiple employees of the company. And what my colleague
18 said is correct that the bulk -- the focus of the production
19 was on the broiler industry and that's why this is a very
20 different circumstance than the *Broilers* case.

21 At this point we cannot rule out that documents
22 related to pork may have been produced as part of that
23 production. And so essentially what we have to do is go
24 through, as part of our normal negotiations with the
25 Plaintiffs over certain terms or custodians or other items,

1 to try to identify what part of that production may be
2 relevant to this matter and produce those consistent with
3 the way that we produced them -- produced other documents in
4 response to Plaintiffs' RFPs.

5 So it is a corpus of documents that exists that is
6 being preserved, but the burden associated with producing
7 pork-related materials from that is similar to the burden of
8 producing any other documents in the case. The only
9 difference being that the materials have already been
10 collected, but all other burdens would be attendant to that.

11 I don't have an estimate on the number of
12 documents but it was a sizeable production and it involved
13 multiple employees of the company and producing e-mail and
14 other documents.

15 THE COURT: All right. Thank you. Appreciate it.

16 MS. BRIESACHER: The last item on their list, Your
17 Honor, is number seven, which is the search methodology
18 order. And here, I mean, it's simply too early in the case
19 to lock Defendants into a search methodology order now.
20 Defendants will not decide what analytical tools they might
21 use, whether it be TAR or CAL or search terms and culling
22 until we know the volume, until we know the number of
23 custodians. We won't know volume and custodians until there
24 are collections, which I think, you know, we're all in
25 agreement won't be necessary before the Motion to Dismiss

1 rulings. Search terms and any culling that is used are
2 further tethered to RFP responses, and we can't fully
3 respond to RFPs until we know the scope of the case.

4 If the parties are required to do this now,
5 regardless of the Motion to Dismiss outcome, any order is
6 likely to be, need to be, renegotiated or revisited once the
7 parties are kind of getting into the nitty-gritty of
8 discovery. And this, again, it's going to be inefficient to
9 try and do this twice. Plaintiffs have said that they want
10 something akin to the search methodology order in *Broilers*.
11 But I think, you know, even in *Broilers* the search
12 methodology order was not entered until after the Motions to
13 Dismiss ruling, and these orders really are not a kind of
14 one size fits all. Any order in this case will have to be
15 tailored to the scope of this case.

16 Your Honor, at the end of the day, all of these
17 discovery actions are going to require a lot of, you know,
18 the parties spinning their wheels, for not only parties but
19 also for the Court. A lot of work which will have to be
20 redone once the Motion to Dismiss rulings come out.

21 And while Plaintiffs are correct that there is a
22 substantial cost and burden associated with the portion we
23 all agree is stayed, kind of the collecting, the reviewing,
24 the producing, there's also going to be a substantial cost
25 associated with these six discovery tasks that Plaintiffs

1 propose. Client time, attorney time, vendor time, trying to
2 pull and understand information from the last 12 years,
3 assessing database sources over the last 12 years, many of
4 which will be legacy systems, negotiating RFP responses,
5 figuring out what can be done, what's accessible, what's
6 inaccessible, you add in the negotiations, the meet and
7 confers and trying to take disputes to the Court, all will
8 become kind of unduly burdensome and start to incur
9 significant costs for the Defendants. You know, between now
10 and when the ruling comes out we will be doing these types
11 of discovery requests that before you know it end up
12 incurring the high discovery costs that *Twombly* cautions
13 against and costs that the Defendants are seeking to avoid
14 in the first place by filing this Motion to Stay.

15 For these reasons, Your Honor, we ask that the
16 Court grant a limited stay of discovery and order only those
17 tasks identified by the Defendants, that is the initial
18 disclosures, the org chart production, and the ESI and
19 protective order move forward pending the Motions to
20 Dismiss.

21 And I meant to ask at the outset, with your
22 permission I would like to reserve a few minutes for
23 rebuttal if I have time left.

24 THE COURT: I'll give you a chance to reply.

25 MS. BRIESACHER: Thank you, Your Honor.

1 THE COURT: Mr. Clark.

2 MR. CLARK: Your Honor, Brian Clark for the Direct
3 Purchases Plaintiffs, speaking on behalf of all Plaintiffs.
4 And just one note and change from what we submitted on
5 Friday, my colleague Shana Scarlett will address the issues
6 with the Department of Justice documents when we get to that
7 point.

8 THE COURT: All right.

9 MR. CLARK: I just have a couple of minutes of
10 preliminary things and then I'm happy to walk through the
11 seven categories we submitted and talk through those on kind
12 of how we see them fitting together.

13 I think it's clear neither party is proposing to
14 the Court we have a full stay or that we have full
15 discovery. I think in essence what Plaintiffs are saying is
16 we need to prime the pump relatively fully so that when we
17 get to the point of being able to move forward with the full
18 discovery, which I think generally the burden would be a lot
19 more significant if we were saying load and process your
20 ESI, which is going to be terabytes, it is going to be big,
21 what we're doing is negotiating the scope of that. Which
22 custodians are they. Have you actually gone in and
23 preserved and ensured, you know, that their devices and
24 personal e-mail accounts are actually preserved, and that's
25 part of why we want to front load a lot of this.

1 And it's clear no matter what we do -- I mean, you
2 can look in the room today, there's over 30 attorneys --
3 there's going to be some burden. The question is whether
4 that burden is reasonable or whether it's undue. And we
5 think with what we're proposing here, stopping short of
6 fully opening the pumps and really going into the full
7 processing ESI, is a reasonable and a practical way to
8 balance the parties' interests in accomplishing something
9 during the pendency of the Motions to Dismiss.

10 And then, frankly, we have done this exact thing
11 in *Broilers* with some of the defense counsel sitting in this
12 room. We had the same issues of, Well, it's hard to know
13 what the scope will be. After the Motion to Dismiss there
14 might be various things that could happen. We were able to
15 do that during the pendency of the Motion to Dismiss and
16 about a year during -- a little under a year during which
17 the Motion to Dismiss was pending, we were able to negotiate
18 the objections to Rule 34 requests, we were able to get
19 these ESI disclosures, inform the custodians discussions,
20 you're able to do that all of that during the pendency of
21 the Motion to Dismiss.

22 THE COURT: And I'm taking this a little bit out
23 of order --

24 MR. CLARK: Sure.

25 THE COURT: -- but you mentioned it and the

1 question occurred to me. What about defense counsel's
2 argument that, for example, with respect to the Rule 34
3 requests and trying to negotiate the scope, that it can only
4 be hypothetical until we know whether or to what extent
5 Judge Tunheim might decide to narrow the cases as opposed to
6 kind of all in or all out? Tell me why that's not a
7 legitimate concern and raises the likelihood that you'd all
8 have to go back and sort of start from scratch to
9 renegotiate it again.

10 MR. CLARK: First off, I mean, odds are, I mean,
11 we gave you the citation from the magistrate in *Broilers*, 90
12 percent of the cases in the Northern District of Illinois, I
13 think it's comparable in Minnesota, are not resolved on
14 Summary Judgment or Motion to Dismiss, so if you're gonna
15 play the odds, it's unlikely to happen. But even if the
16 statute of limitations tolled the time period for damages,
17 that doesn't mean that's the exact time period with respect
18 to relevant liability information. Even if the damages
19 period was the four years preceding when we filed in June
20 2018, the acts that took place back to 2008, 2009, those are
21 relevant to what then happens during the damages period.

22 So even if that were to happen, it's not the case
23 that while therefore ESI would only process four years back,
24 that's not how it's worked in prior cases where that has
25 happened and generally speaking, it -- that trimming doesn't

1 usually happen. It's a hypothetical issue. It came up
2 repeatedly in *Broilers*. And in the end, the cases tend to
3 move forward in full and that's why, rather than kind of sit
4 on our hands after December 3rd when these Rule 23(a)
5 disclosures are made, we can spend the next six to nine
6 months moving these issues forward that we all know from
7 experience will take -- the tasks that we have listed in
8 pages 4 to 5 of our briefs, the seven tasks, those will take
9 six to nine months.

10 It's going to take time. Some of them need to be
11 staggered. I agree with defense counsel, certainly the
12 search methodology order makes some sense to do after we
13 have negotiated offers of productions, negotiated document
14 sources like custodians, it certainly makes sense to follow
15 that. But in our view that's a case management discussion
16 with Your Honor on how to stagger that and ensure that
17 happens at the right point. But we don't see any of those
18 issues on a potential different time period, meaning that we
19 need to sit on our hands for the next six to nine months.
20 We think these things can be accomplished productively.

21 And part of the reason is there is some real
22 prejudice to Plaintiffs if we don't do this. And some of
23 the issues that come up is, in our experience over and over
24 again in cases, preservation to really be effective is about
25 specific people. It's which person had this role. And in

1 our ESI disclosures that's how we start that conversation.
2 We ask was there a person at your company that had a
3 responsibility for analyzing Agri Stats' reports, and was
4 there anyone who specifically had the task of identifying
5 the competitor's data in those reports. By putting those in
6 the disclosures, it feeds into our discussions then about
7 the custodians and who should be designated and it ensures
8 that relatively early on, rather than waiting another six to
9 nine months, it's already been five, but rather than waiting
10 over a year, we do that now and ensure, okay, yeah, that
11 person left but we have a drive sitting in IT from when they
12 left. Let's make sure we grab it and it doesn't get
13 reformatted.

14 So that's part of the benefit of doing these
15 discussions now is on the preservation side. You also
16 identify things like e-mail accounts before an employee
17 leaves and becomes a former and it's a lot harder to grab
18 their personal e-mail account or cell phones. And it
19 requires a custodian interview process which -- I mean, when
20 we're told, as a kind of a broad matter there's a litigation
21 hold, there's a lot of details that are under that and a lot
22 of variation between counsel on how they actually implement
23 that.

24 When we get into these specific discussions, it
25 avoids the possibility that somebody was just missed. It

1 happens all the time, but it's a lot less likely to happen
2 if we have these disclosures and we discuss custodians.

3 And then just I guess going back to the fact that
4 in *Broilers* we did these tasks and we got an order about
5 almost exactly a year ago, November 20th, we had substantial
6 completion of document production from the 14 original
7 defendants in that case by July 18th. So roughly 8 months
8 from the date of the order on the Motion to Dismiss to
9 substantial completion of production for the original 14
10 defendants. There were some others that produced a little
11 bit later that were later-added defendants. That's not
12 possible if we sit on our hands and don't accomplish the
13 tasks that we've laid out here because nobody would know
14 whose data to collect, what was being offered to produce,
15 and you can't hit the ground running in that way. So it
16 really would just tack on an extra six to nine months if we
17 didn't do these things now.

18 And I'm happy to talk through each of the
19 categories however Your Honor would like. I tried to hit
20 them, but in our view they fit together. I mean, we've
21 tried to stage it here and really lay it out in an order
22 that makes sense to us, one through seven, that we obtain
23 information on e-mail auto delete in the ESI disclosures,
24 for instance. That helps tell us how likely is it we're
25 going to get a full time period of e-mail from a particular

1 custodian. If it's a 60-day auto delete, we might need to
2 designate a lot more custodians because there might only be
3 a few people who kept their e-mail for the full time period.

4 And then getting into the Rule 26(f) report,
5 discussing the time period for what will be produced,
6 discussing the number of interrogatories, that kind of then
7 feeds into the offers of production and actually kind of
8 dealing with the amended Rule 34(b)(2) of what is somebody
9 actually offering to produce. In *Broilers* we did charts for
10 each party on what they were actually offering to produce.
11 Those discussions kind of all feed into each other and at
12 the end of the day when we have an order on the Motion to
13 Dismiss, we've identified the document sources, we've
14 identified the offers of production, and then we know what
15 people -- everybody knows what their task is when that order
16 comes in rather than starting all these tasks at day one
17 there.

18 THE COURT: All right. Thank you.

19 MR. CLARK: Thank you, Your Honor.

20 THE COURT: Yes, on the DOJ.

21 MS. SCARLETT: Shana Scarlett from Hagens Berman,
22 Your Honor.

23 Just briefly, today I think that the Defendants
24 have acknowledged that the Department of Justice documents
25 from Agri Stats indeed do contain documents relating to the

1 pork industry. On the face of the CID itself from the
2 Department of Justice it says that the documents are
3 relating to an investigation to exchange competitively
4 sensitive pricing cost information, including in the swine
5 industry. There's been no articulated burden associated
6 with production of these documents.

7 We know from the letter closing the investigation
8 from the Department of Justice there's simply three hard
9 drives. The only argument made against production of these
10 documents has been that there may be some broiler-related
11 documents intermixed with pork documents. However, there's
12 a couple reasons why that shouldn't weigh against production
13 here.

14 First, there will be a protective order in effect
15 that governs what Plaintiffs do with these documents and how
16 they are used that gives Defendants the security that they
17 are confidential. Withholding relevant documents within a
18 document family, for example, would deprive Plaintiffs of
19 relevant context to understand the documents if one relates
20 to broilers or one relates to pork.

21 THE COURT: So are you characterizing the DOJ
22 production as a document family?

23 MS. SCARLETT: No, I'm sorry, within the
24 production itself if there are, for example, an e-mail and
25 attached to that e-mail is a report that relates to pork and

1 a report that relates to *Broilers* --

2 THE COURT: And that, of course, is a separate --
3 I know there's a separate dispute on that.

4 MS. SCARLETT: There is, there is. I'm just --
5 for the first time I think that today we've just heard the
6 suggestion that Agri Stats felt like it might do a relevance
7 review of these Department of Justice documents prior to
8 production.

9 THE COURT: And why -- if we go down that path,
10 why wouldn't they? As long as we're not characterizing, and
11 I don't see how we could, the entire production as a
12 document family, it is essentially another source within
13 which there may be relevant documents. So why wouldn't
14 there necessarily be, or at least appropriately be, a
15 relevance review within that collection?

16 MS. SCARLETT: From our perspective, to the extent
17 Defendants are raising burden as a reason not to produce at
18 this stage, conducting a relevance review of these documents
19 would essentially be a self-imposed burden, not one
20 Plaintiffs are requiring and not one that we necessarily
21 agree with.

22 In the *Broilers* litigation, Agri Stats did produce
23 the entire set of documents that it had produced to the
24 Department of Justice. It moved to -- it moved for a
25 protective order, in fact, only of searching additional

1 sources. So these documents have already been produced in
2 related litigation in their entirety. So to have them
3 produced here is an incremental burden and one that would be
4 of little cost or expense to Agri Stats, especially at this
5 point in the case when there's a lot of other things that
6 could happen, but we just wanted to make that point.

7 And as well, there is also a relevance here to the
8 *Broilers* litigation that can't be denied. And while it's
9 true chicken is not a pig, many of these chickens and pigs
10 are owned by the same corporate family. And so there is a
11 relevance to all of these broiler documents, reports, and
12 even, you know, as the complaints allege, the conspiracy in
13 the *Broilers* litigation under Plaintiffs' theory of the case
14 in some ways gave birth to the pork conspiracy. And so
15 there is a relevance here separate and aside from just the
16 fact that there's a common investigation by the Department
17 of Justice into these two industries.

18 THE COURT: Okay. Anything else?

19 MS. SCARLETT: No, Your Honor. Thank you.

20 THE COURT: All right. Thank you.

21 All right. I bet you want to reply.

22 MS. BRIESACHER: Yes. Just a few quick points,
23 Your Honor.

24 First, you know, on preservation, there's been
25 some discussion of preservation. Defendants have fully

1 complied with all of their preservation obligations under
2 the rules.

3 Two, you know, we talk about the *Broilers*
4 experience and what happened in *Broilers*. But first, you
5 know, there's actually two *Broilers* cases. There's one that
6 the Plaintiffs like to talk about pending in Illinois.
7 There's actually a second one, a *Broilers* growers case, in
8 Oklahoma and there were Motions to Stay practices in both.
9 The Oklahoma case was a full stop stay of discovery and the
10 Illinois case is what the Plaintiffs have highlighted here.
11 So there have been two courts that have looked at this and
12 reached different conclusions, although they both agreed
13 that full discovery should not go forward.

14 Kind of second, even where tasks have moved
15 forward or were allowed to move forward, I mean, this is a
16 different case. A pig is not a chicken. They are not equal
17 just because something may --

18 THE COURT: I think we're all in agreement.

19 MS. BRIESACHER: Yes, yes. But just because
20 something may have happened in the *Broilers* case does not
21 mean it should happen here.

22 And finally, for those of the defense group that
23 were involved in the *Broilers* case, we now know what a huge
24 burden that all of this pre-work resulted in. And the
25 Plaintiffs refer to, you know, the six to nine months of

1 work that this is all going to entail, we have six to nine
2 months of work fully engaged on these threshold tasks.
3 There was a reference in the exhibits to kind of six-hour
4 hearings, there was briefings. That is a substantial burden
5 to the Defendants that potentially will not be needed. And
6 all of this pre-work is not going to be some breeze skate in
7 the park. It's going to be a lot of work for the Defendants
8 to undertake.

9 And finally here, you know, there is no prejudice
10 or limited prejudice here. This is not an indefinite stay
11 of discovery. It's limited in scope, you know, and I want
12 to emphasize limited. We're going to be in front of Judge
13 Tunheim in about six weeks arguing the Motions to Dismiss
14 and then, you know, the order will follow. And, you know,
15 even a limited stay of discovery, any prejudice is going to
16 be offset by the benefits that are going to be achieved
17 following the Motion to Dismiss ruling. It will help
18 streamline discovery and it will allow the parties to know
19 scope so they can focus on what is actually relevant
20 following the Motions to Dismiss.

21 THE COURT: Well, what about Mr. Clark's argument
22 that -- and obviously if Judge Tunheim dismisses one or more
23 Defendants altogether, I get that then none of this would be
24 necessary. But if what happens if what happens is that
25 Judge Tunheim limited the case in some way, for example,

1 through deciding that the recoverable damages are more
2 limited than what has been pleaded, what about Mr. Clark's
3 argument that, even so, the scope of relevant and
4 discoverable documents won't be affected all that much
5 because to the extent the documents reflect conduct, that
6 will still be relevant?

7 MS. BRIESACHER: Well, you know, I think that's
8 probably going to result in some significant disputes, you
9 know, about what the relevant time period will be. You
10 know, right now the allegations are spanning over the last
11 12 years from the requests for production that have been
12 served, the ESI disclosures, you know, the relevant time
13 period for the most part that they are putting forward is
14 tied to kind of the years of allegations. There are a few
15 that they are seeking a look-back period of a few years and,
16 you know, we'll look at that and decide if that's
17 reasonable. But I think it's a stretch to say that a 4-year
18 damages period means that you get documents back 12 years
19 and that all documents back 12 years are going to be
20 relevant.

21 So I think unquestionably if the statute of
22 limitations and the relevant time period is narrowed, there
23 unquestionably is going to be a narrowing of what is
24 relevant in the case, all right?

25 THE COURT: Are there -- have you looked at the

1 requests for production to see whether there are requests
2 for which your position on discoverability, on what you
3 would be willing to concede or not to concede, can be
4 formulated regardless of whether the case is limited in some
5 fashion? I mean, I understand what you're saying about if
6 the -- your position on relevance may be this if Judge
7 Tunheim limits the case, and it may be that if he doesn't.
8 But it isn't -- time period is not the only potential scope
9 issue or other objection issue to be negotiated here. Have
10 you looked at whether you could even make progress on
11 negotiating these requests for production while saving
12 issues that are necessarily affected by time period?

13 MS. BRIESACHER: Yeah. So, you know, I haven't
14 kind of gone through them with a fine-tooth comb to see if
15 like, yes we can do this one, no we can't do this one. But
16 really the scope of the case is going to be a major concern
17 regardless of what the request is. So I think it's going to
18 be tough to kind of cherry pick one or two where we may be
19 able to make progress when kind of the full scope of the
20 case, who is left, time period, what claims are left, are
21 going to be really critical in understanding proportionality
22 and burden and what might be able to be done.

23 THE COURT: What about on the DOJ?

24 MR. BERNICK: Your Honor?

25 THE COURT: Yes.

1 MR. BERNICK: I'm sorry, this is Justin Bernick,
2 counsel for Agri Stats. If I could have a moment to respond
3 to the DOJ-related argument? I didn't mean to interject but
4 I wanted to make sure that I got some points in if we could.

5 THE COURT: Agreed.

6 MR. BERNICK: Thank you, Your Honor. I think
7 first what I would say in response to your earlier question,
8 almost 400,000 pages of documents were produced in response
9 to the DOJ CID. And this is a core relevance issue. I
10 think, as the Plaintiffs indicated, this is mostly pork
11 documents with a few chicken documents thrown in, that's
12 absolutely not the case. That's absolutely not the case.
13 This investigation was focused on chicken and at the end of
14 the day that's where the advocacy before the Department of
15 Justice took place and that's why the Department of Justice
16 closed the investigation.

17 As we said, we cannot rule out the possibility
18 that there are pork-related documents in the production, but
19 that's a very different situation and that's why a different
20 conclusion was reached in the *Broilers* litigation, why all
21 these materials were produced, because the investigation was
22 focused on chicken. Here that's not the case and so there
23 would be a particularly high burden associated with
24 reviewing those materials.

25 And, Your Honor, I had the privilege of appearing

1 before you in the Mylan ERISA EpiPen Litigation not too long
2 ago addressing a very similar issue where there was a corpus
3 of documents that had already been collected and the
4 argument there was that, Well, because they are already
5 collected, they should all just be produced when they were
6 not all relevant to the case at hand.

7 And that's exactly what's going on here, Your
8 Honor. The fact that there's a protective order in place
9 that could address confidentiality concerns doesn't mean
10 that my client Agri Stats is somehow obligated to produce
11 documents that have no bearing on the litigation pending
12 here at this time. So that would be our position on that
13 issue, Your Honor.

14 THE COURT: All right. Thank you.

15 You're done?

16 MS. BRIESACHER: Yep. Thank you, Your Honor.

17 THE COURT: Anything further?

18 MR. CLARK: I just have one minor point to make on
19 the reference to the other *Broiler* litigation just for
20 context. That case involved contract growers in the chicken
21 industry. Our case is about the buying of the meat.
22 There's a second case that counsel referenced regarding
23 growers. They have a Sherman Act claim, and I believe a
24 Packers and Stockyard Act claim. There have been dozens of
25 such cases that have had, I guess, mixed results. I think

1 there's a totally different history there versus a case like
2 the *Broilers* or like *Pork* where we're for the first time, I
3 believe in decades, addressing the issue of the price fixing
4 and the supply restrictions of the actual supply of meat.
5 That's what's, I think, so relevant of the *Broiler*
6 litigation in Chicago as opposed to the one in Oklahoma.

7 THE COURT: Thank you.

8 Well, although certainly the parties agree here
9 that some stay of discovery is appropriate, that being said,
10 the Court still has to look at it independently because we
11 have an independent interest in making sure that cases move
12 forward in accordance with Rule 1. And so I agree with the
13 parties that this is a case that does justify a limited,
14 although not an entire stay of discovery. The -- in making
15 that decision, and really in connection with any of the
16 details of a stay, I'm not looking at the merits of the
17 Motions to Dismiss.

18 First, I'm not going to be deciding the Motions to
19 Dismiss. Second, they haven't been fully briefed yet, and
20 so I think it would be inappropriate for me to try to, you
21 know, sneak a peek at them or purport to guess at how they
22 might come out.

23 But I think the other factors do justify a stay of
24 a good part of the discovery that would otherwise take place
25 in a case like this. There's no doubt that discovery in an

1 antitrust litigation is burdensome, it is expensive, and I
2 think courts have regularly found that burden to justify a
3 stay of broad discovery while the Court considers pending
4 Motions to Dismiss.

5 I also believe that particularly given the parties
6 are taking active steps in negotiating disputes around
7 preservation, I think that prejudice associated with a delay
8 in actual production is ameliorated, and I don't think that
9 the public interest is going to be harmed by not allowing
10 full discovery to go forward at this time or that the
11 Court's ability to manage these cases efficiently is going
12 to be harmed by not allowing full discovery to go forward at
13 this time.

14 So it won't come as a surprise but I think it's
15 important to articulate for the record that I agree that a
16 stay of full discovery is appropriate here.

17 That being said, as I think at least one if not
18 both counsel mentioned, the devil is in the details of what
19 that stay is going to look like. Some of that I think I can
20 tell you now. I think some of it I'm going to need to mull
21 over for a bit, at least over the course of the Thanksgiving
22 weekend, although I'm not going to keep you waiting
23 indefinitely for this. So let me give you a sense of at
24 least in broad strokes what my thinking is that I will do
25 and order with a more -- with a more detailed rendition of

1 what I think the parties -- or what I will require the
2 parties to move forward with and what I agree should be
3 deferred.

4 With respect to disclosures regarding ESI systems,
5 and I have -- to understand at least what the Plaintiffs are
6 looking for, I'm looking at their proposed order, which I
7 have already mentioned, which is document number 205-2. I
8 am -- I know that the Defendants are willing to produce and
9 have committed to produce organizational charts to the
10 extent readily available. I am -- I expect I will require
11 more than that, but I notice that the proposed order from
12 the Plaintiffs doesn't necessarily include some -- or at
13 least not at all parts includes some pretty important
14 qualifiers in Judge Gilbert's order, and that is -- that I
15 think are important here -- and that is to the extent the
16 information is readily available. I think that's not quite
17 the same thing and maybe not at all the same thing as
18 readily accessible.

19 And my sense was that Judge Gilbert was trying to
20 recognize and to give some credence to the concerns of the
21 Defendants that they may not be required to go into every
22 file cabinet and search in every corner of the company now
23 for things that they may need to look more carefully for
24 later.

25 So I am going to require more of -- more than just

1 the organizational charts that have been -- that have
2 already been promised, but I am going to make sure that what
3 I do require is qualified by that readily available
4 qualifier. And I do note that even in the Plaintiffs' order
5 there were some categories where you've proposed that at
6 least one document for each year at issue, to the extent
7 they exist and to the extent they are readily available, I
8 don't see any of this as requiring more than -- certainly
9 not more than what Judge Gilbert required. And I think
10 there are some categories where I may reign it in a little
11 bit more. That's why I need to think a bit over the course
12 of the weekend.

13 But as a -- kind of as a philosophical and a
14 practical matter, I am persuaded that more needs to happen
15 over the next several months than what Defendants are
16 prepared to agree to out of the blocks. I understand that
17 it will be work, I understand it will take time, I
18 understand it wouldn't have needed to be done if you get
19 what you're hoping to get out of the Motions to Dismiss.
20 But the prospect of having to start from scratch on this
21 when Judge Tunheim issues his order on the Motions to
22 Dismiss is one that isn't compatible with my view about
23 moving these cases forward efficiently. So I am going to
24 require more than what the Defendants are ready to agree to
25 out of the blocks.

1 And another part of my thinking here is also
2 preservation. I hear you saying, and I credit that you've
3 taken meaningful steps towards preservation, but I also am
4 persuaded by the argument that Mr. Clark made that to be
5 confident in those steps, some of this same work has to be
6 done to identify custodians, to identify data sources.
7 Maybe not all of it, but a good part of it, so that everyone
8 can be confident that you know what you need to keep and
9 you've taken the effective steps to keep it.

10 So I am going to require more the dive into
11 custodians and data sources than I think the Defendants had
12 hoped for in the course of this -- in the course of this
13 hearing. The details of that, though, I need to think about
14 a bit more.

15 The Defendants have already agreed they will do
16 26(a)(1) initial disclosures and the parties will, so we're
17 all in agreement that's going to move forward.

18 For now I'm going to defer requiring a 26(f)
19 report and setting a Rule 16 conference. I'm going to
20 revisit that. One of the things we'll get to when we get to
21 the status conference is scheduling more status conferences.
22 I'm going to plan to revisit that at what I expect will be a
23 late January status conference which will take place after
24 the hearing on the Motions to Dismiss. We'll take another
25 look at whether we could make some meaningful progress even

1 if, hypothetically speaking, on a Rule 26(f) report and a
2 Rule 16 conference. But I'm going to defer that for now.

3 With respect to the -- just working through these
4 tasks in order -- with respect to the documents produced by
5 or in connection with the DOJ investigation of Agri Stats,
6 I -- I don't agree that as a collection those documents are
7 automatically relevant; and I believe that Agri Stats, and I
8 don't know for sure whether any of the other Defendants
9 produced documents in connection with that investigation.
10 No one else has -- my sense is that no one else, at least
11 pork documents, but if the Plaintiffs are looking for more
12 than pork documents on the argument that they may be
13 relevant to this case as well, there is not nearly enough in
14 front of me now to make that call.

15 So absolutely if we were going to make -- move
16 forward on that at all at this juncture, it would require
17 first a meet and confer between counsel about relevance, and
18 if counsel couldn't agree to relevance, it would require
19 traditional Rule 34 briefing on relevance and
20 burdensomeness, the burdensomeness associated in this case
21 not with collecting the documents and probably not even with
22 a privilege review. Presumably that was done, although it
23 might have been different in that context from this context,
24 but certainly the burden of reviewing those documents for
25 relevance.

1 Since there is a group of documents that has
2 already been collected, though, I am going to have the
3 parties move forward with that meet and confer process at
4 this time, and I will take up the issue sooner rather than
5 later of whether any of the documents that were produced to
6 the DOJ by Agri Stats are relevant and discoverable and
7 whether the burden of reviewing them at this point for
8 relevant documents suggests that that actual production
9 ought to be deferred. But since we know we've got a group
10 of documents, I think we can make some progress forward on
11 that.

12 So I'm going to ask for -- well, let me ask this.
13 Is it Plaintiffs' position -- I'm thinking out loud, always
14 a bad idea -- is it Plaintiffs' position that everything
15 that any of the Defendants produced to the DOJ in connection
16 with the investigation of Agri Stats, regardless of what
17 kind of food material it referred to, is relevant and
18 discoverable here?

19 MS. SCARLETT: So what I believe to be true,
20 taking Defendants at their word, is that none of the pork
21 Defendants sitting at this table have produced other than
22 Agri Stats. So we're talking about Agri Stats alone and the
23 set of 400,000 documents that were referenced. And I hear
24 Your Honor saying that you don't want the full corpus
25 produced to Plaintiffs.

1 THE COURT: I'm certainly not persuaded that it
2 ought to be, that's true.

3 MS. SCARLETT: So you'd like us to go back and
4 meet and confer with Agri Stats about what should be
5 produced from that and whether there's some agreement that
6 can be reached on a subset of the 400,000 documents?

7 THE COURT: Let's start with that, and then based
8 on that, then Agri Stats will need to take a look at
9 what that -- the burden associated with that review would
10 be. And that's something I'll take into account because,
11 again, if it appears that it would be a significant burden,
12 and I don't have any information about that, but if it
13 appears that it would be a significant burden, then
14 certainly one of the things I need to take account of is
15 whether the spirit of the stay of discovery at this juncture
16 suggests that that, too, ought to be deferred. But at least
17 you might have resolved your -- perhaps resolved your issues
18 about relevance and discoverability so that we would be that
19 much farther down the road once the Motions to Dismiss get
20 resolved. So meet and confer further on that.

21 Counsel for Agri Stats, do you have any questions?
22 Are you hearing what I'm proposing on this?

23 MR. BERNICK: No, Your Honor, I don't believe we
24 have any questions and we'll meet and confer.

25 THE COURT: All right. So why don't you get me a

1 letter update on the result of that meet and confer.

2 Let's -- I know we've got the holidays coming up here.

3 What's the fair -- what gives you enough time that doesn't
4 just kind of let you -- everybody sort of drag it out at a
5 leisurely pace for having that meet and confer and reporting
6 back to me about it?

7 MS. SCARLETT: We would be able to do that within
8 two weeks if counsel for Agri Stats is able to do that as
9 well.

10 MR. BERNICK: That works for Agri Stats, Your
11 Honor.

12 THE COURT: All right. So why don't you meet and
13 confer and report back to me, let's see, it's the 21st
14 today? Why don't you get me a report by December 10th.
15 That will give you two weeks to meet and confer and then
16 some time to put together the joint letter that
17 characterizes where you're at. Based on that, let's look at
18 whether we want to proceed with motion practice at this
19 juncture or whether it makes sense to defer it while we wait
20 to see what happens with the Motions to Dismiss. But at
21 least I'd like to progress that issue.

22 MS. SCARLETT: Yes, Your Honor.

23 THE COURT: Okay.

24 MR. BERNICK: Your Honor, I'm sorry, did you say
25 December 10th? I just want to make sure --

1 THE COURT: Yes, December 10th for the letter to
2 me.

3 MR. BERNICK: Thank you.

4 THE COURT: And that letter can be -- well, you
5 can go ahead and e-file that letter. I think that makes it
6 easier to kind of keep the docket straight and let everybody
7 know what's going on. In general I'm going to require that
8 letters be e-filed unless we get to some point where we're
9 talking about one of two things I could see as an exception.
10 One would be if there's a letter that talks about the status
11 of settlement negotiations, we're a ways away from that but
12 obviously those would not be e-filed.

13 Also if there's a situation where a letter for
14 some reason addresses material that shouldn't be accessible
15 by everyone who currently has access to the combined file.
16 And I don't know what that would be, but I can't rule out
17 that possibility. If that happens, then, you know, give me
18 the hi sign, let's talk about how best. But let's assume
19 that when I require updates that I'm going to expect them to
20 be e-filed.

21 Counsel for Agri Stats, our court reporter needs
22 you to introduce yourself again on the phone.

23 MR. BERNICK: I'm sorry. This is Justin Bernick
24 B-e-r-n-i-c-k, at Hogan Lovells.

25 THE COURT: And eventually I'll get these names

1 memorized as well, although I'm tempted as part of the order
2 to ask you to prepare a pictorial and voice identification
3 dictionary or a guide, but we'll defer that.

4 So that deals with four. Five I want to think
5 about a bit more, which is the negotiating Rule 34 requests.
6 I have to believe that there's a way to make some progress
7 on that. I just want to minimize the chances that we're
8 starting from a standing stop if these cases, in whole or in
9 part, move past the Motions to Dismiss. I want to make as
10 much progress as we can but I don't want to set up a
11 situation where the parties are doing something in such a
12 vacuum that it has to be redone and then redone again.

13 So I want to think about that, but I think where
14 I'm headed is to at least send the parties back to meet and
15 confer about whether some number of the Rule 34 requests can
16 be negotiated without necessarily knowing exactly how Judge
17 Tunheim might slice and dice these cases. Right now what
18 I've got is the Defendants telling me we would just as soon
19 not negotiate any of them and the Plaintiffs wanting to
20 negotiate all of them. I'm not sure whether you've talked
21 about whether some progress could be made in a more nuanced
22 way. So I do want you to have that conversation. Is that
23 something you also can talk about over the next couple of
24 weeks and report back to me?

25 MR. CLARK: Yes, Your Honor.

1 MS. BRIESACHER: Yes, Your Honor.

2 THE COURT: All right. So why don't you get me a
3 letter on that by December 10th and based on what I see
4 there, if you can't come to some common understanding then
5 I'll call it one way or the other, because you obviously
6 need an answer; but I'd like you to try to see if there's a
7 more nuanced approach that's something short of the all or
8 nothing that you're currently -- that -- which is where your
9 parties are -- where the parties are currently.

10 With respect to document sources, I'm inclined --
11 I want to take another look at -- I want to think about this
12 a bit more, take another look at and see how it's precisely
13 been handled in other cases, but I can tell you that I'm
14 leaning toward having the parties negotiate document
15 sources. Now, there can certainly be caveats built into
16 that negotiation, but I am concerned about making sure that
17 everything that needs to be done is being done with respect
18 to preservation and I think that a lot -- if that is being
19 done, I think that this discussion of document sources isn't
20 necessarily a huge step past that. So let me -- I need to
21 think about that a bit, but I am inclined to require the
22 parties to make some progress on that.

23 And even if it's, well, if the case is limited in
24 this way, then we're not willing to agree to these document
25 sources; but if it's unlimited, then we agree; or if it

1 survives Motion to Dismiss as pleaded, then we agree that
2 those document sources need to be in the mix.

3 I'm not going to put you through a two-week drill
4 on that. That's obviously a longer conversation, and I'm
5 going to get out an order that tells you more precisely what
6 I'm going to require here. But I just wanted to let you
7 know where I was leaning so you can start to think about
8 where this might head.

9 On search methodology, again, there's a lot about
10 search methodology that I expect is not going to be -- well,
11 there's a lot about search methodology that will depend on
12 the scope of the case. On the other hand, there's a lot
13 about search methodology that is about process that isn't
14 necessarily scope specific. So just as with the Rule 34
15 requests, I am going to require the parties to take another
16 look at the -- and this really overlaps with the ESI
17 protocol discussion that we've got coming up in the status
18 conference -- but I'm going to require the parties to take a
19 look at that as well and see whether a good part of that can
20 be negotiated without having to qualify it by the eventual
21 time scope of the case. I absolutely get that a good part
22 of it may have to wait, but I think some of it can be nailed
23 down and we'll talk about that a little more in detail when
24 we get to the status conference.

25 I think that covers, to the extent I'm going to

1 rule from the bench on this, I think that covers the Motion
2 to Stay. Why don't we take a break, let the parties get up,
3 move around a little bit. Let the court reporter take a
4 little bit of a break, and we will come back at 11:20 and
5 we'll pick up with the status conference.

6 MR. GUSTAFSON: Thank you, Your Honor.

7 (Recess taken at 11:06 a.m.)

8 * * * * *

9 (11:24 a.m.)

10 **IN OPEN COURT**

11
12 THE COURT: Please be seated. We are on the
13 record once again in the matter of In Re: Pork Antitrust
14 Litigation, 18-cv-1776. We're going to turn now to the
15 status conference in this matter.

16 One thing I did want -- I realized after I went
17 back into chambers, I wanted to clarify a bit with respect
18 to the discussion we had right at the end of the motion
19 hearing.

20 With respect to custodians, my thinking will
21 likely be different on the -- between the question of having
22 custodians identified for purposes of the ESI tasks, we'll
23 call them, the threshold ESI tasks that Plaintiffs have
24 identified, and negotiating custodians for purposes of
25 eventual, if we get to that point, eventual collection and

1 production. I'm leaning -- for the reasons I described,
2 particularly with respect to preservation, I'm leaning
3 towards a more robust identification of custodians and
4 sources for purposes of the ESI threshold tasks, probably
5 less persuaded at this point that it makes sense to
6 negotiate the custodians from whom documents will be
7 collected for purposes of responding to the Rule 34
8 requests, particularly because the parties are still, at my
9 request, going to be doing some meeting and negotiating
10 about -- meeting and conferring about how much progress you
11 can make in the short term on negotiating those objections.
12 So I just wanted to -- I think my comments had appeared to
13 conflate the two and they are two very different things and
14 I just wanted to not mislead you about the status of my
15 thinking in that regard.

16 So let's turn to the status conference. You've
17 submitted a joint status report at Docket Number 210 and you
18 also provided a letter and letter brief at Docket Number 203
19 and you provided me with some -- let me find them here --
20 you provided me -- and thank you very much for the way you
21 organized this information. I'm in all of your debt. You
22 provided me with some helpful materials in terms of
23 highlighting for me where your agreement was and where your
24 disputes are with respect to the ESI protocol and with
25 respect to the protective order, and the chart format I

1 found especially helpful. So thank you for doing that for
2 me. I appreciate it.

3 Other than the ESI protocol and the protective
4 order, it looked like the other thing on the agenda for this
5 status conference that you've identified is an update about
6 the parties' discussions on preservation of devices and
7 device archives of senior executives. So those are the
8 three agenda items that you all identified for me. The
9 fourth that I want to raise is the prospect of scheduling
10 additional status conferences and what the appropriate
11 timing for that ought to be. So we'll get to that at the
12 end, but I just wanted to get that on your radar.

13 Let's start with the issue of the protective
14 order. It appeared that there was largely agreement on that
15 but a single dispute which had to do with whether the
16 parties would be required to log communications involving
17 in-house counsel. That looked like that was the only
18 dispute that was identified in terms of the draft. Is that
19 correct?

20 MR. CLARK: Yes, Your Honor.

21 THE COURT: Who intends to address that for the
22 Plaintiffs?

23 MR. CLARK: I will, Your Honor.

24 THE COURT: All right. Mr. Clark, will you come
25 forward.

1 MR. CLARK: Your Honor, I don't have a lot more to
2 offer beyond what we submitted in the status brief. I
3 think, in short, this is a -- we felt like we already kind
4 of met halfway on excluding from logging communications with
5 outside counsel. I mean, any logging is excluded if it's
6 during the relevant time period if it's with outside
7 counsel.

8 Defendants want to take it a step further and move
9 to in-house counsel. There are issues with dual roles from
10 any in-house counsel, there are issues with copying in-house
11 counsel, especially in these supply restriction cases.
12 There is very often, and we have cited some orders of our
13 own experience with this, that if we don't have the notice
14 that the communication exists and is being withheld, we
15 would have no way to challenge a wrongful withholding. And
16 wrongful might be in good faith. Somebody just has a
17 difference of opinion on whether or not a particular
18 communication is privileged. All we're asking is that it be
19 logged so we have notice. Defendants' proposal would give
20 us no notice and no opportunity to object to an area that we
21 have never had a case where we aren't engaging in
22 significant motion practice on withholding of communications
23 relating to in-house counsel. So that's why we do not agree
24 to that exclusion category from logging.

25 THE COURT: I understand.

1 Who would like to address this on behalf of the
2 Defendants?

3 MR. SUMMERLIN: I will, Your Honor.

4 THE COURT: All right.

5 MR. SUMMERLIN: Again, my name is Gene Summerlin.

6 I understand the Plaintiffs' concern with close
7 calls, and we don't disagree that to the extent that there
8 may be in-house counsel that might be acting in a dual
9 capacity, there could well be a good-faith fight over
10 whether those items are subject to privilege or not. But
11 our point was to the extent that we've got communications
12 including in-house counsel that are solely in their legal
13 capacity, so essentially no different than communications
14 that we've agreed not to log as outside counsel, in that
15 limited circumstance, we can avoid the need to do privilege
16 logs, or at least if we're looking for middle ground, do
17 more of a categorical type of log so that the burden here,
18 again, is all falling on the Defendants, not on the
19 Plaintiffs. And we're trying to avoid having to go through
20 unnecessary work for documents that are clearly going to
21 fall within the privilege.

22 THE COURT: What about Mr. Clark's concern about
23 the communications where in-house counsel is one of several
24 copy recipients?

25 MR. SUMMERLIN: I would say that I think -- I

1 didn't bring the language up here --

2 THE COURT: I've got it here.

3 MR. SUMMERLIN: But I think that the language that
4 we've used is, you know, without good cause, you know, we
5 don't have to do the log, I think that's exactly what that
6 language is addressed towards is saying that in those
7 situations where it may be a close call or it's not
8 absolutely clear that the communication involving in-house
9 counsel is solely in their legal capacity, if one of the
10 Defendants wishes to assert a privilege there, that would
11 require a log.

12 THE COURT: All right. I understand. Thank you.

13 On this one, although I have been there, I
14 sympathize with the concerns of -- and the burden of logging
15 communications involving in-house counsel, this is one where
16 I agree with the Plaintiffs that they will need to be
17 logged. I think because in-house counsel are often copied
18 along with others, sometimes multiple others, where there
19 often are close calls about the capacity in which they were
20 acting, I think that it's best to require that they be
21 logged so that the opposing side is on notice that those
22 documents have been withheld and have the information they
23 need to take issue with it.

24 So I will enter the protective order in the form
25 it was proposed, but I will not be adopting the proposed

1 language to exclude in-house counsel from privilege logs.

2 Let's move to the issue of the ESI protocol, and
3 who wants to address that?

4 MR. CLARK: Your Honor, Brian Clark for
5 Plaintiffs.

6 THE COURT: Mr. Clark.

7 MR. CLARK: I will just briefly hit on each of
8 these because I think we made our points we wanted to in the
9 letter brief.

10 The first disputed paragraph in Exhibit D of this
11 submission, that's Docket 203-1, page 50 of 89, the first
12 provision there, II(G), relates to the production of entire
13 document families. That's the practice that our group of
14 Plaintiffs had always been familiar with up until the Court
15 agreed with Defendants to permit the withholding of e-mail
16 attachments in the *Broiler Chicken* case. We provided what
17 we view as a little bit of a horror story of what happened
18 in that case when that provision is allowed to kind of run
19 amuck in a production where 22 percent of one Defendant's
20 entire document production was affected by this where
21 perhaps it was presented as kind of a pinhole that just a
22 few documents would go through it, it was a big -- it can
23 often become big enough that a truck can go through it. And
24 it has significantly added to the costs and motion practice,
25 Plaintiffs' review burden.

1 And so what our proposal is, and we have already
2 agreed, Defendants may redact personal privacy information,
3 Social Security numbers, et cetera, but we do not agree that
4 there should be withholding of e-mail attachments. And
5 that's both because Rule 34(b) requires production as kept
6 in the ordinary course. An e-mail is maintained in one's
7 e-mail Outlook account with attachments as part of that
8 document, and Federal Rule of Evidence 106 also requires
9 that if a document in fairness may be reviewed in whole, it
10 should be produced in that way.

11 If that doesn't happen, the problem is you put a
12 document in front of a witness and it, on its face,
13 indicates it's not complete. If it's an e-mail with one
14 attachment, you only have an e-mail. You have a document
15 that says, Attachment withheld as irrelevant. Now, you, on
16 its face, you have an incomplete document and you go to
17 trial with a witness who is not available at trial and you
18 can't litigate your case. And so our proposal is not to
19 permit the withholding of documents in the document family.

20 THE COURT: Just with respect to the personal
21 information piece -- all right. I just wanted to make sure
22 that -- all right. I didn't initially see that you had
23 incorporated that language in your proposal, but I see that.

24 MR. CLARK: Exactly. We've agreed on the
25 redaction of that personal information, not on the redaction

1 of information viewed as irrelevant.

2 THE COURT: Right.

3 MR. CLARK: But, yeah. So that, in our view,
4 still allows one of the bases Defendants proposed for
5 withholding parts of e-mail families was, Well, what if it's
6 purely personal information, and I think redaction protects
7 that concern.

8 THE COURT: Okay. Thank you.

9 MR. CLARK: And I can talk through -- I think the
10 relevancy redaction piece I've just spoken to. In our view,
11 this is -- kind of, again, creates a lot of satellite
12 litigation. If the document was relevant to the case, it's
13 relevant. And redacting it, one, makes it an incomplete
14 document now; and, two, leads to a lot of satellite
15 litigation on whether or not it was, in fact, relevant.
16 Maybe it was a comment in the context of a relevant document
17 that somebody views as off color. It ends up leading to a
18 lot of fights that don't need to happen if documents are
19 just produced in the first place.

20 And then I think, is my sense right, that on
21 notice of e-mail domains culled, the Court is intending for
22 us to meet and confer on that; and then the second disputed
23 provision that goes on to the next page on parameters for
24 culling?

25 THE COURT: That's where I'm headed on those is to

1 require some further meet and confer to see whether some
2 others of those disputes can be narrowed even though we
3 don't know where the motion is going to come out. I don't
4 think I need anything further on that, although I may check
5 in with the Defendants to see if there's some pushback and
6 would give you a chance to respond.

7 MR. CLARK: Thank you, Your Honor.

8 THE COURT: All right. Yes, sir.

9 MR. SUMMERLIN: I'm back.

10 THE COURT: You are.

11 MR. SUMMERLIN: With respect to categories II(G)
12 and II(K)(2), they are both dealing with kind of relevancy
13 redactions.

14 THE COURT: Um-hum.

15 MR. SUMMERLIN: What Defendants are proposing in
16 both of these paragraphs is that they be allowed to either
17 withhold documents or redact documents that only involve two
18 very limited categories of information; one highly -- if the
19 reference is to specific highly confidential and proprietary
20 nonresponsive business information relating to non-pork
21 business. So we're -- again, in any discovery discussion,
22 right, we start with the idea of you're entitled to discover
23 what's relevant. And we're saying, Okay, when we've got a
24 certain category of non-responsive, irrelevant data, we can
25 redact that or not produce it if it's highly confidential

1 and proprietary and it relates to a purely non-pork business
2 process.

3 Again, what we've got here is a group of
4 Defendants, essentially competitors, and so even with a
5 confidentiality order, there's concerns in providing that
6 kind of confidential proprietary information among your
7 competitors.

8 And then secondly, and I don't know that we really
9 have a disagreement here based on what we just heard, is
10 information of a personal nature as defined.

11 THE COURT: And to that point, have you looked at
12 their proposal on personal information and are you -- and
13 does that do what you need to do? In other words, I want to
14 make sure I know what the real dispute is here. And I
15 understand it with respect to relevance redactions, but when
16 it comes to personal information, are you satisfied with
17 what they've proposed to address it? Do you believe that
18 your proposal in that regard provides some additional
19 protection or where is the dispute?

20 MR. SUMMERLIN: Well, I don't know that our two
21 proposals are very different. I mean, what you may see is a
22 redaction that covers an entire document if it's personal
23 information. Or I guess part of the issue is if we are
24 allowed to redact, just talking about the personal
25 information side, if we're allowed to redact personal

1 information that's nonresponsive -- otherwise nonresponsive,
2 I think that's sufficient.

3 To me, the question is, okay, if you've got, for
4 example, an attachment that is a payroll file or something
5 like that where, you know, essentially all of the relevant
6 data would be personal and would be redacted and it's not
7 otherwise relevant in the case, do you need to produce that
8 document fully redacted as opposed to our proposal saying,
9 Well, we would produce a placeholder saying that that
10 document has not been produced because it's personal
11 information.

12 I don't know that there's a -- that may be a
13 distinction without a difference in terms of the practical
14 effect.

15 THE COURT: All right.

16 MR. SUMMERLIN: So I don't know that that's where
17 our true dispute lies, but I do think we are teed up on the
18 confidential proprietary information.

19 THE COURT: I understand. Okay.

20 MR. SUMMERLIN: Thank you, Your Honor.

21 THE COURT: All right. With respect to the issue
22 of personal information, I'll do a more careful review of
23 the parties' proposed alternate language but the parties are
24 in agreement, I think. I think the thought bubbles over
25 your heads is essentially the same with respect to personal

1 information. So when I enter this order, I will adopt the
2 language that I think best characterizes that agreement.

3 I'm going to take the issue of relevancy
4 redactions under advisement. I share -- strongly share the
5 antipathy of the courts to relevancy redactions, but I want
6 to think about whether there's any part of what the
7 Defendants are proposing here that may be appropriate
8 because I am cognizant of the fact that we have a case that
9 involves competitors and that there is, perhaps, a
10 heightened concern for access to highly-confidential
11 information. So I want to make sure that I'm fully taking
12 that into account. I will enter an order that reflects
13 where I come out on it, but I just want to let you know I'm
14 not yet ready to rule on that particular issue.

15 Moving on to the IV(d) (2), which is notice of
16 e-mail domains culled; and then V, which are the parameters
17 for culling and reviewing ESI and paper documents, both of
18 these are ones where I think Mr. Clark correctly anticipated
19 that I would like counsel to go back to the table and meet
20 and confer to see whether there are at least some of these
21 that can be resolved at this point in the litigation that
22 don't really need to wait for the Motions to Dismiss.

23 And again, I acknowledge that you can always make
24 the argument you wouldn't have to do it at all if the cases
25 are dismissed, but I'm -- that, in and of itself, is not

1 sufficient here. What I want to know is are there some of
2 these that you can negotiate. Because if the cases survive
3 the Motion to Dismiss, albeit in a more limited form, you
4 would still be taking the same position about how some of
5 these provisions ought to be negotiated.

6 So I want you to meet and confer on that to see
7 what you may be able to agree to at this stage of the
8 litigation, and then report back to me about whether there
9 are things that in good faith you believe simply can't be
10 negotiated until you know more about what -- how these cases
11 will be, if they are, delimited. It doesn't mean I'll
12 accept that outright, but I at least would like you to have
13 that conversation first and report back.

14 Now, I realize this may take a bit more time than
15 some of the other things we have been talking about. Is
16 that December 10th date still a valid one or do you need
17 more time for this conversation?

18 MR. CLARK: Your Honor, from Plaintiffs'
19 perspective, that's enough time but certainly before
20 Christmas I think.

21 MR. SUMMERLIN: Your Honor, I think from
22 Defendants' perspective --

23 THE COURT: Why don't you come to the podium just
24 so we've got the --

25 MR. SUMMERLIN: Yeah, let me come up here to the

1 mic. You know, certainly with respect to IV(D)(2), I think
2 that's a fairly straightforward issue on whether we're going
3 to disclose e-mail domains that are culled.

4 The issues that are raised in paragraph V, though,
5 I think are much more complex in the sense that it's always
6 a little bit difficult to talk about how we're going to
7 handle some of the specifics of culling and reviewing ESI
8 when we haven't yet gathered that information. Because at
9 least from my perspective, and I may be a little bit
10 simplistic on this, but the primary driver for me as we
11 start to make decisions on how we're going to handle ESI
12 really comes down to volume, right? It's making a
13 determination is this a production that we can put ice on
14 everything, or do we have to start looking at other
15 technologies that will allow us to conduct a review to
16 determine relevance and all of that.

17 And so I think while in general it's possible for
18 us to meet and confer and maybe come to agreement on some of
19 the provisions of paragraph V in a fairly short amount of
20 time, there are other things like the search methodology and
21 the use of TAR or other advanced technologies that, again,
22 from my perspective are difficult to try and come up with a
23 rational decision at this point before we really know, well,
24 what is the volume of data we're talking about.

25 THE COURT: At this point my requirement you meet

1 and confer acknowledges that that may be the case.

2 MR. SUMMERLIN: Yeah. So I think if it's going to
3 be acceptable for the parties to kind of say, Well, we met
4 about TAR and, you know, the Defendants' position is we
5 don't know yet because we don't know what volume we're
6 dealing with, then I think December 10th would be fine to do
7 that.

8 THE COURT: All right. Let's start with that. If
9 it's -- yeah, let's start with that and see if you can chip
10 away at some of these, and then let me know where you think
11 you can and why. And again, I'm not saying that I'll
12 automatically take that, but I want the parties to do as
13 much as even they acknowledge they could do at this point
14 and then let's see what's left and think about a rational
15 way to move the ball forward on anything else.

16 So by December 10th report back to me on further
17 meet and confer with respect to the IV(D)(2) and V issues in
18 the ESI protocol.

19 Since -- well, let me ask the question. My
20 inclination would be to wait until I hear back from you on
21 that before I enter any of this because it isn't like you're
22 going to need it in two weeks. Any reason why I ought to be
23 entering this piecemeal while this meeting and conferring is
24 still going on?

25 MR. CLARK: No, Your Honor. I think that makes

1 sense. And just one other piece. I think to the extent
2 there's a choice to be made based on volume, I think a lot
3 of what we've proposed is a little bit agnostic to the
4 volume.

5 THE COURT: That's precisely the conversation I
6 want you to have. If volume really doesn't matter to some
7 of this, then why not have the conversation about whether
8 there are -- whether you do or don't agree that it makes
9 sense. And if it -- if there are reasons other than volume
10 that enter into it, we might still be able to get that
11 sorted out so that what we're left with potentially are the
12 things that are truly influenced by volume.

13 MR. CLARK: And I think on search methodology, for
14 instance, in our view as long as we leave a path for key
15 words, leave a path for TAR, in our view that doesn't matter
16 what choice you make now as long as you know either choice
17 you can make --

18 THE COURT: I'll give the Defendants a chance in
19 the meet and confer to talk about whether they think it's
20 still going to make a difference, but that's the
21 conversation that I don't think has happened yet and that I
22 would like to happen.

23 So I'll look for an update by December 10th. If
24 your update is we worked hard at this but we're still
25 meeting and conferring, that's a perfectly okay response. I

1 just want to keep noses to the grindstone to the extent we
2 can chip away at these issues.

3 Preservation. Tell me where the parties are at
4 with their conversations about preservation of sources
5 relating to the senior executives.

6 MR. CLARK: Your Honor, Plaintiffs and Defendants
7 have had productive conversations. I think the only
8 potential issue I see is maybe with one Defendant, kind of a
9 possession, custody or control issue. From our perspective,
10 we're not, you know, trying to obtain the data itself. We
11 just want to make sure it's been imaged.

12 I think what might make sense is if we can't
13 resolve that in the next 7 to 14 days, we may request leave
14 to file or serve a subpoena for preservation purposes only
15 to kind of cut past the possession, custody or control issue
16 and just get the device in our case imaged. If we have
17 that, I think it might make sense to do it -- I guess a
18 joint letter brief of some type because we have been having
19 productive discussions. But that's how we anticipated
20 resolving the one issue we have with a particular executive.

21 THE COURT: All right. Anybody want to speak --
22 yes, on behalf of --

23 MR. RASHID: Sami Rashid, Your Honor, JBS
24 Defendants.

25 THE COURT: Good morning.

1 MR. RASHID: Good morning. I represent the one
2 Defendant with whom Plaintiffs are having this issue. You
3 know, we don't just view it as a possession, custody or
4 control order. We believe we've taken adequate preservation
5 measures, but we are in agreement -- Mr. Clark and I spoke
6 before we started this morning, we are in agreement with
7 talking about some more. And then to the extent that we
8 cannot reach an agreement, submitting something to Your
9 Honor on a simultaneous basis.

10 THE COURT: All right. And he was talking --
11 Mr. Clark was talking about sometime in the next couple of
12 weeks or so. Does that -- are you in agreement that that's
13 probably about the timetable that you will be raising the
14 issue with me if you can't work it out?

15 MR. RASHID: Yes, Your Honor, that would be fine.

16 THE COURT: All right. That sounds fine.

17 MR. RASHID: Thank you.

18 THE COURT: All right. So anything else other
19 than talking about when we schedule another status
20 conference and whether we ought to go ahead and schedule
21 status conferences on a recurring basis rather than one at a
22 time? Yes, sir.

23 MR. PARKER: Good morning, Your Honor. Rich
24 Parker representing Smithfield. I have two general points.
25 One, it doesn't apply to my Defendant, but I know there are

1 some folks on the phone who have holding companies who were
2 dragged into this litigation and they have nothing to do --
3 they own stock, not pigs. And so I just want to put down a
4 marker in terms of meeting and conferring and moving ahead
5 with those folks, that's going to be a much different
6 proposition because they are really not in the business
7 we're talking about at all. So I just wanted to raise that
8 marker.

9 THE COURT: Well, I guess my question is is there
10 anything about what we've covered so far? For example, the
11 protective order, I assume, has been negotiated among
12 everybody, right?

13 MR. PARKER: Right.

14 THE COURT: The ESI protocol, to the extent there
15 is agreement, has been agreed to by everybody.

16 MR. PARKER: Yes.

17 THE COURT: So are you proposing that some of the
18 Defendants be excluded from any of the meeting and
19 conferring that I've requested?

20 MR. PARKER: Well, I'm also up here to suggest
21 that we meet for status conferences early and often for
22 several reasons. I'm foreshadowing an issue here that if we
23 can't work it out with the other side, we'll bring that to
24 your attention.

25 I represent Smithfield, and I keep -- every time I

1 come here, I hear about chickens. And we don't do chickens.
2 We were investigated by the DOJ. We do have some rights
3 under *Twombly*. We're going to read your order and comply
4 fully, but there is some issues in there, what we call an
5 antitrust or rule of reason, of what the right thing to do
6 is here, and so we may be back with some points here where
7 we don't agree with the Plaintiffs but I would like here to
8 get involved in that because we want to make sure that we're
9 living up to your order and living up to your expectations
10 as well.

11 But I do -- I understand enough about chickens to
12 know that it costs a lot of money, and I've got a client
13 that had nothing to do with that, nothing to do with the
14 DOJ, and so we may have some issues for you, Your Honor, as
15 we go forward, and I think early and often status
16 conferences is probably a good idea, I respectfully suggest.

17 THE COURT: All right. Well, I tend to be a fan
18 of status conferences as well. I don't know exactly what
19 often means. We should talk about that.

20 MR. PARKER: Well, December 10, we have a letter.
21 Maybe we ought to have something after that. I'm always
22 happy to come to Minnesota.

23 THE COURT: I appreciate that. Thank you. Even
24 in December, in January?

25 MR. PARKER: Your Honor, I'm a native actually. I

1 don't live here anymore, but I'm well aware. Thank you.

2 THE COURT: I would say it would be difficult for
3 me to do anything more frequently than monthly and keep all
4 of my other cases going forward at the same time, and I'm
5 not sure that more than monthly is necessary.

6 You'd like to speak? Yes.

7 MS. SCARLETT: Shana Scarlett representing the
8 Plaintiffs.

9 We agree early and often status conferences are
10 helpful. We find them helpful in other cases, just to make
11 sure issues are being discussed thoroughly between the
12 parties and to get Your Honor's guidance as quickly as we
13 can. Sixty days perhaps seems appropriate; thirty days
14 seems a little bit -- you know, we have a lot of issues in
15 this case and a lot of things that need to be dealt with,
16 but certainly from the Plaintiffs' perspective, sixty-day
17 status conferences would be helpful.

18 THE COURT: Thank you.

19 Mr. Parker.

20 MR. PARKER: Rich Parker again. We have an
21 argument on the 10th. Maybe we ought to have a conference
22 on the 11th. Just a suggestion.

23 THE COURT: You know, that sounds like that may be
24 worth doing. Let me kind of get a sense. Are there nodding
25 heads? Anybody think we need to be getting together during

1 the week between Christmas and New Years, for example? No,
2 no, not seeing a ground swell of enthusiasm for that idea.

3 Let me see what I can do. I think that makes
4 sense. I would certainly like to take advantage of the fact
5 that folks will be in town on the Motion to Dismiss. I do
6 not have my calendar memorized for that date, but let me
7 take a look at it. And ideally I think it would make some
8 sense to do it after the hearing on the Motion to Dismiss.
9 Judge Tunheim usually keeps his cards pretty close to the
10 vest, but if there were any strong signals sent during the
11 conference that you think I ought to be aware of, then I
12 think I would rather have the conference after that hearing
13 rather than before it.

14 I'm seeing somebody in the back of the courtroom.
15 Did you want to address this?

16 MS. STILSON: Yes, Your Honor. This is Jaime
17 Stilson.

18 THE COURT: Actually, why don't you come -- just
19 so we've got everybody on the microphone and so the folks on
20 the phone can hear you.

21 MS. STILSON: Yes, Your Honor. I understand that
22 my colleague Britt Miller was trying to say something on the
23 telephone and she couldn't be heard, so I just wanted to
24 make sure that she had the opportunity to address Your
25 Honor. Thanks.

1 THE COURT: All right. Ms. Miller.

2 MS. MILLER: Your Honor, I wasn't sure if you
3 could hear me. I spoke up but I wasn't clear about whether
4 or not my phone line was coming through. Can you hear me
5 now?

6 THE COURT: I can absolutely hear you now, and I
7 didn't hear you before, so thank you for being persistent.

8 MS. MILLER: Not a problem.

9 I just wanted to address the issue that Mr. Parker
10 raised a moment ago as we are -- I represent one of the
11 corporate defendants who is impacted by the question of
12 being a holding company. The question Your Honor asked was
13 whether or not any of the things that we have already talked
14 about could potentially impact those companies differently,
15 and my answer to that would be yes. Literally I, and I
16 believe some of the other Defendants, represent a parent
17 company that has been named in the litigation, from what we
18 can tell, only by virtue of them being a partial owner of
19 the underlying pork producer, such that to the extent we are
20 dealing with preservation -- having to meet and confer on
21 preservation issues or custodians or document sources and
22 the like, depending on the breadth of those requests, that
23 could be quite an undertaking because we are talking about a
24 corporate parent -- a partial corporate parent who does
25 virtually nothing related to pork.

1 So to the extent there can be some limitation on
2 the requirement that those corporate defendants have to
3 fully participate pending the Motion to Dismiss, we'd like
4 Your Honor to consider it.

5 On the status hearing, I certainly have no
6 objection; and although I love Minnesota, I'm happy to limit
7 the number of times we have to come up for hearing. I
8 personally have to be in court on the 11th in a different
9 court, so if it would be possible to schedule something
10 perhaps the afternoon of the 10th, since we're seeing Judge
11 Tunheim in the morning, that would be appreciated, but I
12 understand if that's not possible with Your Honor's
13 schedule.

14 THE COURT: Let me see what I can do. It may
15 require moving some things around, but I absolutely hear
16 that that would make the most sense for you all and I do
17 want to try to minimize the burden on you if I can.

18 This issue of the defendants who have been
19 described as kind of the owners of the holding companies
20 kind of came up -- came up here where -- and didn't get a
21 chance to be fully addressed previously. I'm starting to
22 run into some timing issues here. I've got a conference
23 call starting in just a few minutes.

24 Let me ask -- let me ask this. Let me get a -- it
25 wasn't even really discussed in the briefs in any way that

1 described a different concern, nor have I had a chance to
2 hear from the Plaintiffs on whether they'd see it
3 differently. So I -- let me do this. I want the -- two
4 things. The meeting and conferring that I've required needs
5 to include, separately if necessary, the counsel who are
6 representing the Defendants who were characterized or
7 characterized themselves simply as holding companies. So
8 you can talk about whether it might make sense to do
9 something differently or whether Plaintiffs' position --
10 Plaintiffs would take a different position or be willing to
11 take a different position with that. Why don't you, when
12 you update me on December 10th, address that and include a
13 position letter on this issue.

14 So to the extent you haven't been able to work it
15 out, I need to know more about whether that's really a
16 separate issue that I ought to take different account of
17 than I have with respect to the Defendants generally, okay?

18 MS. MILLER: Understood, Your Honor.

19 THE COURT: So I don't want ten pages. I want a
20 couple -- you know, a couple of pages of a letter that lays
21 out your position about why it does or doesn't have
22 anything, or should or shouldn't have anything to do with
23 the decisions I need to make about the scope of this stay.
24 Make sense?

25 MR. CLARK: Yes, Your Honor.

1 THE COURT: All right. So that means since --
2 that you may not get a full stay order from me right after
3 the Thanksgiving weekend because I'd like to wrap as much up
4 as I can. I think I'm inclined to wait until I've gotten
5 those meet and confer letters on December 10th and then wrap
6 as much up as I can after that point. All right? Make
7 sense?

8 Anything else we need to address for the good of
9 the order?

10 All right. Well, thank you all. I appreciate the
11 conversation. I'll see what I can do about the 10th and I
12 wish you all a Happy Thanksgiving.

13 MR. GUSTAFSON: You as well, Your Honor.

14 (Court adjourned at 12:02 p.m.)

15 * * *

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17
18 I, Carla R. Bebault, certify that the foregoing is
19 a correct transcript from the record of proceedings in the
20 above-entitled matter.

21
22
23 Certified by: s/Carla R. Bebault
24 Carla Bebault, RMR, CRR, FCRR
25